Editor's note: Appealed – aff'd in part rev'd in part sub nom. Stewart Capital Corp. v. Andrus, Civ.No. C-79-123 (D. Wyo. April 24, 1980), defendant-intervenor continued appeal after Govt withdrew; aff'd No. 80-1642 (10th Cir. Feb. 4, 1983) 701 F.2d 846

H. R. DELASCO, INC. ET AL.

IBLA 77-221, etc. Decided February 2, 1979

Appeal from decisions of the New Mexico, Colorado, Montana, and Wyoming State Offices, and the Eastern States Office, Bureau of Land Management, relating to offers to lease for oil and gas filed in the simultaneous filing program.

Affirmed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents--Oil and Gas Leases: Applications: Drawings

   Where a drawing entry card form of offer to lease a parcel of land for oil and gas is prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, and the offer is signed by such agent or attorney-in-fact on behalf of the offeror, the requirements of 43 CFR 3102.6-1 apply, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether the latter signed his principal's name or his own name as his principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

2. Administrative Authority: Generally--Administrative Practice--Appeals--Bureau of Land Management--Delegation of Authority: Generally--Public Lands: Generally--Rules of Practice: Supervisory Authority of the Secretary--Secretary of the Interior--Solicitor, Department of the Interior

   Where the Secretary has declined to exercise his jurisdiction, a decision rendered by

this Board is final for the Department. Hence, statements by BLM and arguments of the Solicitor, while valuable to the Board, are not binding upon the Board.

3. Administrative Practice--Administrative Procedure: Adjudication--Administrative Procedure: Rule Making--Regulations: Applicability--Regulations: Interpretation

The interpretation of an existing regulation by this Board to determine its applicability to the facts at hand does not constitute rulemaking by the Board.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Raye, Denver, Colorado, James W. McDade, Esq., Jason R. Warran, Esq., McDade and Lee, Washington, D.C., for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

These appeals arise from various decisions of Bureau of Land Management (BLM) State offices in New Mexico, Colorado, Montana, and Wyoming, and the Eastern States office regarding appellants' offers to lease for oil and gas under the simultaneous leasing program, 43 CFR Subpart 3112. These appeals have been consolidated for consideration at the request of appellants' counsel because of the general similarity of material facts and issues of law. As noted in the list of cases in the appendix hereto, three distinct groups of factual data are identified; each will be discussed separately.

I

Appellants in this first group received first priority in drawings conducted by BLM pursuant to its simultaneous leasing program. Each of the appellants had engaged Stewart Capital Corporation (Stewart), a private filing service, directly or through an intermediary, to formulate drawing entry cards (DEC) to lease certain parcels of land listed by BLM in its monthly notices of land available for simultaneous oil and gas leasing. Pursuant to the several contracts, Stewart selected those parcels which it regarded as "economically desirable" and thereafter prepared the appropriate DEC for those parcels, naming its clients as offerors. The DEC were then submitted to the appropriate office of BLM to participate in the monthly drawings.

In each of the cases in this group, Stewart affixed the offeror's name to the DEC by means of a facsimile signature stamp. Noting this fact, BLM, acting in accordance with the holding of this Board in Robert C. Leary, 27 IBLA 296 (1976), inquired of each offeror the circumstances regarding the formulation and execution of the subject DEC. The various responses disclosed unanimously the above facts.

On the basis of this information, BLM concluded that an agent or attorney-in-fact relationship existed between the offerors and Stewart. BLM thereupon rejected these DEC offers for failure of the offerors and Stewart to comply with the terms of 43 CFR 3102.6-1. 1/ We affirm.

II

Each of the appellants in this group appeals from separate decisions of BLM calling for additional evidence by affidavit prior to issuance of an oil and gas lease. Each case arises from a DEC drawn with first priority for the respective parcel in a BLM monthly drawing under the simultaneous leasing program. As each DEC bore a facsimile signature of the offeror, mechanically affixed to the card, BLM required each offeror to submit an affidavit disclosing whether the facsimile signature was intended to be the signature of the offeror and giving details as to the formulation and execution of the offer, i.e., information sufficient to permit BLM to ascertain if an agency relationship existed within the meaning of 43 CFR 3102.6-1. Appellants failed to submit such affidavits.

In Leary, supra, this Board affirmed the action of BLM to require additional information where a DEC bears a facsimile signature. We adhere to that position and would affirm each of the decisions in this group calling for additional evidence.

However, it develops that each of these DEC was prepared for the named offeror by Stewart pursuant to individual contracts. The relationship between Stewart and its client-offerors has been considered by this Board at some length in D. E. Pack, 30 IBLA 166, 84 I.D. 192 (1977); D. E. Pack (On Reconsideration), (en banc) 38 IBLA 23, 85 I.D. (1978). Counsel for appellants concede that the relationship between Stewart and the instant offerors is identical to that considered in Pack, supra, so that an "agency" as defined by this Board therein would have been found to exist if the required affidavits had been submitted.

1/ For our purposes, the relevant portion of this regulation is subsection (a)(2), set forth in part below:

"(2) If the offer is signed by an attorney-in-fact or agent, it shall be accompanied by separate statements over the signatures of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney-in-fact or agent or such other person has received or is to receive any interest in the lease when issued, including royalty interest or interest in any operating agreement under the lease, giving full details of the agreement or understanding if it is a verbal one. The statement must be accompanied by a copy of any such written agreement or understanding."

This Board ordinarily would not perform initial adjudication of cases arising in BLM, such adjudication being a function delegated to BLM. However, in the interest of reaching a final decision in these cases, which have been suspended pending reconsideration of Pack by the Board, we will issue a final decision for the Department in this group of cases.

Accepting the concession by counsel that each of these offers was prepared in an identical manner as the DEC of John S. Runnels, U34366, considered in Pack, i.e., that Stewart exercised discretionary authority in selecting the land on which to file and thereafter affixed the offeror's signature to a DEC, we find that an agency within the meaning of 43 CFR 3102.6-1 has been established. We further find that the agency statements required by this regulation have not been filed and accordingly reject each of the DEC listed in this group.

III

These appeals relate to 11 drawing entry card lease offers filed for separate parcels offered by the Wyoming State Office, Bureau of Land Management, for oil and gas leasing under the simultaneous filing procedures, 43 CFR Subpart 3112. Each of these DECs was drawn with first priority for the subject parcel. Stewart is acknowledged to have prepared and filed each of the subject DECs. A protest by one Charles Corely that a preexisting agreement between Stewart Capital, Gretchen Capital, or Melbourne Concept and appellants violated Departmental regulations by creating an undisclosed interest was dismissed by BLM as unsupported by any evidence. However, BLM thereafter required each of the present appellants to submit documentary evidence of a so-called "Put Option" and the service agreement between the appellants and the filing service based at 100 South Wacker Street, Chicago. Each of these appellants responded that the DEC was prepared by Stewart, but variously disclosed the existence of "Put Options" with Stewart, Gretchen Capital, or Melbourne Concept. Essentially the "Put Option" provides that the lessee at his exclusive choice may sell a part interest (either 33-1/3 percent or 35 percent, depending upon the company involved) to the service entity, Stewart, Gretchen, or Melbourne, as indicated in the option, within a stipulated period of time and for a predetermined amount of money. BLM considered the "Put Option" to be violative of 43 CFR 3112.5-2, which states:

> [W]here an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease * * *.

BLM thereupon rejected each of these DEC offers, because the large number of DECs filed by Stewart for each parcel here involved gave Stewart an unfair advantage in obtaining an interest in an oil and gas lease for the land, contrary to 43 CFR 3112.5-2.

The question whether the "Put Option," accessible to those customers of Stewart, Gretchen, or Melbourne who subscribed to it, gave to the service entity an undisclosed interest in the lease was considered at length in D. E. Pack, 30 IBLA 166 (1977). There, the Board held that where a lessee, at his sole election, may opt to convey a designated interest to Stewart (or Gretchen or Melbourne) at a pre-established price, there is a possibility that Stewart may acquire some lease rights, but that Stewart (or Gretchen or Melbourne) under the option has no claim or interest in the DEC offer or subsequent lease which is enforceable in law or in equity.

> Where a person files an oil and gas lease offer through a leasing service under an arrangement whereby the leasing service advances the first year's rental, selects the land, and controls the address at which the offeror may be reached, but no enforceable agreement is entered into whereby the offeror is obligated to transfer any interest in any lease to be issued to the leasing service, the service is not a party in interest in the offer merely because it may have a hope or expectancy of acquiring an interest, and the offeror is not precluded from stating that he is the sole party in interest in the offer.

30 IBLA at 175.

We therefore overrule the State Office decision rejecting these DECs on the rationale that Stewart had an unfair advantage in violation of 43 CFR 3112.5-2 by means of the "Put Option." Each offeror could properly make his certificate that he was the sole party in interest in his DEC under 43 CFR 3102.7.

There is, however, a valid reason to disqualify these DECs. Each offeror has clearly stated that his DEC was prepared by Stewart. The operations of Stewart in filing DEC for its clients has been the subject of the Board's attention in D. E. Pack, 30 IBLA 166 (1977), D. E. Pack (On Reconsideration), 38 IBLA 23 (1978).

There is nothing in any of these case records to suggest any different operation by Stewart in the preparation of the DEC at issue. Stewart selected the land for filing, affixed the signatures of the offerors by use of a facsimile, made the filing, and paid the first year's rental (subject to reimbursement by the offeror upon notice). That practice by Stewart was held in Pack to be an agency within the ambit of 43 CFR 3102.6-1, so that DECs so prepared are properly rejected unless accompanied by signed statements required by 43 CFR 3102.6-1.

Accordingly, the State office decisions in these cases are modified to show rejection of the DECs for failure of the offerors and agent to comply with the mandatory requirements of 43 CFR 3102.6-1. While, in ordinary circumstances, this Board would not perform such initial adjudication, that being a delegated function of the Bureau of Land Management, we do it here in the interest of having a final decision in these cases without passage of additional time.

Our holding in each of the three groups of cases, above, relies heavily upon the Board's decision in D. E. Pack (On Reconsideration), supra. Therein under facts substantially identical to the present cases, we held that where a DEC was prepared by a person or corporation having discretionary authority to act on behalf of the named offeror, the requirements of 43 CFR 3102.6-1 applied, so that separate statements of interest by both the offeror and the agent must be filed, regardless of whether the agent signed the principal's name or his own name as principal's agent or attorney-in-fact, and regardless of whether the signature was applied manually or mechanically.

In their statement of reasons on appeal, appellants set forth the following allegations of error:

1. The rule enunciated by the Board in D. E. Pack, 30 IBLA 166 (1977), failed to grant the appropriate deference to BLM and its properly adopted rules, directives, and interpretations. The rule, in addition, modified or reversed statements and opinions of BLM, the Solicitor, and the Court of Appeals for the Tenth Circuit.

2. The Board's decision in Pack constituted unauthorized rulemaking by the Board. Furthermore, the formalities of rulemaking as set forth in the Administrative Procedure Act (APA) were not followed by the Board.

3. The retroactive application of the rule enunciated in Pack was arbitrary and capricious and constituted an abuse of discretion.

[1] Appellants' first contention on appeal focuses on the authority of the Board and its relationship to BLM, the Solicitor, and the Secretary. This authority is set forth in 43 CFR 4.1:

> (3) Board of Land Appeals. The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf.

The import of this section is clear. Where the Secretary has declined to exercise his jurisdiction, a decision rendered by this Board is final for the Department. Hence, statements by BLM and

arguments of the Solicitor, while valuable to the Board, are not binding upon the Board. Appellant in Pack petitioned the Secretary to exercise his supervisory powers and take original jurisdiction of the case. This the Secretary specifically declined to do.

With respect to appellants' contention that this Board modified or reversed the Court of Appeals for the Tenth Circuit in Foster v. Udall, 335 F.2d 828 (10th Cir. 1964), and Pan American Petroleum Corporation v. Udall, 352 F.2d 32 (10th Cir. 1965), we feel that these cases are distinguishable from the facts at hand. Neither case involved the signing of an offer to lease by someone other than the offeror himself. Neither case involved the present lottery system of determining priorities for the award of oil and gas leases.

[2] Appellants' second contention on appeal is that the Board engaged in unauthorized rulemaking in reaching its decision in Pack. A careful reading of Pack will disclose that the Board interpreted 43 CFR 3102.6-1(a)(2), set forth in the margin as footnote 1, to require agency statements from an offeror and a filing service where the filing service formulates an offer and affixes the signature of the offeror to a DEC. This Board simply applied the regulation to the facts before it. Implicit in this holding was a determination that formulation of an offer by a filing service renders it an agent within the meaning of the regulation. This determination was settled law. Evelyn Chambers, 27 IBLA 317, 83 I.D. 533 (1976). It is proper for this Board to interpret an existing regulation to determine whether it applies to the facts before it. This is not rulemaking; this is adjudication.

[3] Appellants' third contention on appeal, i.e., that retroactive application of the Pack decision was arbitrary, capricious, and an abuse of discretion, has been addressed at length in the majority opinion of D. E. Pack (On Reconsideration), supra, at pp. 36-52. For the reasons cited in the preceding paragraph, we do not agree that application of the regulation was "retroactive." Even if could be so considered (for our purposes here), it is sufficient to say that the mischief caused by prospective application of the regulation exceeds the ill effects of retroactive application. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947).

BLM cannot be faulted for failure to anticipate and warn prospective offerors against every pitfall in the regulations which might affect them, and its failure to warn of the existence of regulatory requirements does not excuse a party's failure to comply with these requirements. Moss v. Andrus, Civ. No. 78-1050 (10th Cir., filed Sept. 20, 1978); Burglin v. Morton, 527 F.2d 486, 490 (9th Cir. 1976).

Appellants' failure to comply cannot be waived on the grounds that BLM allegedly failed to enforce the provisions of 43 CFR

3102.6-1(a)(2) in the past. This Department remains obligated to enforce its regulations even where in the past its officers may have acquiesced in forbidden conduct by erroneously failing to apply a regulation. 43 CFR 1810.3(a); Energy Resources Group, Inc., 36 IBLA 57, 58 (1978).

Appellants are not entitled to prospective application of 43 CFR 3102.6-1(a)(2). Safarik v. Udall, 304 F.2d 944 (D.C. Cir. 1962), urged upon us by appellants, expressly limits prospective application to situations in which the Department "hands down a decision placing a different construction on a statute or regulation from that laid down in an earlier decision or regulation." Id. at 950.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

_____
Douglas E. Henriques
Administrative Judge

We concur:

_____
Edward W. Stuebing
Administrative Judge

_____
Newton Frishberg
Chief Administrative Judge

APPENDIX

GROUP I

77-221	H. R. Delasco, Inc.	NM 27159	
77-366	Charles D. Simmons	NM 29756	
77-367	Terry A. Kramer	NM 27928	
77-368	Edmund J. Mooney	NM 29624	
77-369	H. R. Delasco, Inc.	NM 27192	
77-370	Carlson/Knauff	NM 29222	
77-371	Cobie/Ebeid		NM 29207
77-372	Bergthor Endresen	NM 29832	
77-373	Howard S. Tierney	NM 28857	
77-374	McDonald/Walsh	NM 28813	
77-376	Garson Lester	NM 27798	
77-377	Frank N. Critelli	NM 28860	
77-378	Pamela W. Kay, et al.	NM 28810	
77-379	Howard F. Todman	NM 29232	
77-380	Robert Eckerman	NM 29231	
77-382	Watkins/Eckerman	NM 28136	
77-383	Watkins/Eckerman	NM 28174	
77-389	Mahrt/Goodman	NM 27639	
77-390	Arthur Yahn, Jr.	NM 29751	
77-391	Samuel Caccamise	NM 30047	
77-393	Donald Jones		NM 29824
77-394	Sol Singer		NM 29625
77-395	Sherwin Gandee	NM 29199	
77-396	John L. Warden	NM 28868	

77-397	Niland/O'Donnell	NM 28309	
77-504	Judith Meisel	ES 16021	
78-37	Vincent Bottarelli	C 25456	
77-500	Jacqueline H. Sipple	ES 16188	
77-565	Anne Cades		ES 16631
77-566	Emma Sabsevitz	ES 16632	
77-567	Stanley V. Cheslock	ES 16718	
77-569	John S. Runnells	ES 16624	
77-570	Paula D. Hughes	ES 16716	

GROUP II

77-155	Robert Jakes		NM 29403
77-190	Judith Ram		NM 29347
77-192	Paul/Hicks		NM 29417
77-193	Group "A" Lease Investors	NM 29000	
77-245	Robert C. Leary, et al.	NM 27162	
77-381	Jonas Brachfield	NM 30348	
77-392	Robert Y. Kopf	NM 30043	
77-510	Group "B" Lease Investors	NM 30636	
77-512	John H. Marshall	NM 30618	
77-513	Rutherford, et al.	NM 30628	
77-514	William W. Dickinson	NM 30625	
77-515	Lee B. Winkler	NM 30852	
77-544	William M. Weaver, Jr.	NM-A 28650	
77-545	Charlotte L. Thorton	NM 28616	
78-51	Edmund J. Mooney	NM 29167	
78-52	Janet E. Kopka	NM 29164	

78-85	George S. Matick	NM 29165	
77-503	Jane C. Haas	ES 17155	
77-506	Michael Newcomb	W 59009	
77-542	Pamela Kay, et al.	W 57992	
77-568	Carol Heller	ES 16020	

GROUP III

77-297	J. G. Fritzinger, Jr.	W 57652	
		Harry Alatchanian, et al. W 57653	
		Judith Meisel W 57654	
		DeRuff Construction Corp. W 57655	
		J. G. Fritzinger, Jr. W 57662	
		Pamela W. Kay, et al. W 57676	
		William H. Weaver, Jr.	W 57677
		J. Barry Douma W 57758	
		Donald W. Strong W 57787	
		Robert Johnson, et al. W 57788	
		June F. Strong W 57803	